

# RESTRICTIONS DURING PANDEMIC: JUSTIFIED BUT IS IT LAWFUL?

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***Summary.** The article analyses if restrictions on business during the quarantines were proportionate and legitimate. The authors of this article argue that the forced closure of businesses during quarantine in its essence resembles the institute of taking private property ownership rights for public needs rather than restricting the freedom of economic activity because activities have been suspended entirely instead of merely being subject to certain operational restrictions. Such restrictions may be imposed only in exceptional cases and in the form of a law. It would be in line to consider proportionate compensations for businesses' losses due to forcible closure from the State.*

***Keywords:** COVID-19; quarantine; Constitutional law; private property; freedom of economic activity; ECHR.*

***Santrauka.** Straipsnyje analizuojama, ar apribojimai verslui karantino metu buvo proporcingi ir teisėti. Šio straipsnio autoriai teigia, kad priverstinis verslo uždarymas karantino metu turi būti traktuojamas kaip nuosavybės paėmimas visuomenės poreikiams, o ne ekonominės veiklos laisvės ribojimas, nes veikla visiškai sustabdyta. Tokie ribojimai gali būti įvedami tik išimtiniais atvejais, įstatymo pagrindu, o Lietuvos Vyriausybė turi proporcingai atlyginti nuostolius įmonėms dėl priverstinio uždarymo.*

***Raktiniai žodžiai:** COVID-19; karantinas; konstitucinė teisė; privati nuosavybė; ūkinės veiklos laisvė; EŽTK.*

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## Introduction

*“Success is not final; failure is not fatal:  
it is the courage to continue that counts.”* – Winston Churchill

In December 2019, the news reached the world – the COVID-19 virus had already spread from China to Europe, Lithuania being no exception. Accordingly, quarantine was imposed in Lithuania twice: the first one in spring (March – June); the second started in November and it still remains. When public authorities began deliberating the necessary measures to tame this virus’s spread, there were many approaches to doing it correctly and which sectors should be restricted or prohibited from operating. There was no common practice among other countries and each one made the seemingly appropriate solutions for it. Both the legislature and the executive bodies have adopted several pieces of legislation and amendments to them, including the introduction of quarantine, suspension of some sectors’ operations, which have affected natural and legal persons alike. Moreover, specific sectors of the economy, such as international tourism, beauty service providers, caterers and others, have largely ceased to operate. Indirectly internal tourism has also come to a halt as movement between municipalities was prohibited.

By its resolution, the Republic of Lithuania (hereinafter – **the Government**) (Resolution No. 207 Declaring Quarantine on the Territory of the Republic of Lithuania, 2020) announced a state-wide quarantine on March 14, 2020. This resolution was based on Article 21 of the Law on the Prevention and Control of Communicable Diseases of Humans (hereinafter – **the Law on Diseases**). Under this law, the purpose of quarantine “is to establish special procedures for the work, living, rest, travel, economic and other activities of persons, procedures for the production of products, their sale, the supply of drinking water, and provision of services, thereby limiting the spread of communicable diseases”. It must be noted that the quarantine required certain services to be closed down completely. The Republic of Lithuania’s Constitution (hereinafter – **The Constitution**) establishes fundamental human rights and the possible grounds for their restriction. One may raise the question as to whether fundamental human rights should have absolute primacy against the protection of health, under what particular conditions absolute suspension of economic activity may be justified.

It must also be borne in mind that the introduction of the emergency and quarantine restrictions in Lithuania restricted the right of movement of persons and economic operators’ rights in the market, due to which they suffered significant losses and restrictions. The ongoing litigation processes on the legitimacy of imposing quarantine in Lithuania and the intentions of suing the State for damages due to the allegedly unlawful quarantine suggests that there is no concrete answer as to whether such restric-

tions were imposed correctly and whether such conditions were in fact proportionate. Economic entities, the legal entity, are treated as privately owned entities. In this case, Article 1 of Protocol No. 1 of The Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – **ECHR**) (Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, 1952) guarantees the human right to the protection of property, the limitations of which must be justified and substantiated.

**The purpose** of the article – to determine whether the restrictions imposed on businesses during quarantine are lawful and proportionate. The tasks are as follows:

1. To determine if the implementation of quarantine in Lithuania is legitimate.
2. To define the concepts of freedom of economic activity at international and national levels and their limitations.
3. To determine if quarantine measures on businesses were proportional.
4. To assess the adequacy of compensations.

**The object** of the research – legal documents that establish quarantine restrictions on economic activity.

The article is **relevant** since Lithuania is still tackling the pandemic and specialists have warned about a third wave. Society and businesses are still unable to return to their former lives, so it is crucial to assess the actions already taken by the Government and to anticipate the most appropriate solutions for businesses in order to strike a balance between the economy and the protection of human health for the pandemics yet to come.

The following **methods** are applied when conducting the research: **comparative analysis** helped to understand different positions on quarantine and restrictions; **legal document analysis** was applied to get insight on the grounds of restrictions and compensations for the restrictions and their content, the method was also involved in analysing laws of both national and international law; **Systemic analysis** was applied when evaluating the case law of the European Court of Human Rights (hereinafter – **ECtHR**), the Constitutional Court of the Republic of Lithuania (hereinafter also referred to as the **Lithuanian Constitutional Court or Constitutional Court**) and the Constitutional Court of the Republic of Austria, content of the provisions of international instruments, and their importance and relation in the context of deviations from obligations; **empirical analysis of case-law** was applied in order to better comprehend the concept of and the grounds of restricting the protection of private property, the freedom of economic activity under the case law of the Lithuanian Constitutional Court and the ECtHR; **the linguistic method** was applied in order to evaluate the relevant terms applicable to the research, to systematically interpret them; the **expert method** was used by conducting a **structured expert interview (Annex 1)** with Mr. Mark Adam Harold who is the chairman of the Vilnius Night Alliance that unites the city's leading clubs, pubs and night

clubs who were directly subject to quarantine restrictions. The expert gave insight into the Vilnius city Municipality's means of aiding the sector affected and communicating with the Government in with SMEs.

The research analyses the works of authoritative legal scholars in term of protecting the freedom of economic activity and the protection of private property in the context of quarantine. Any authoritative legal scholars have not yet analysed the research object, neither in Lithuania nor at the EU or international level. The study analyses the case-law of EU countries regarding quarantine and the case-law of the ECtHR. The Vilnius Night Alliance's structured interview also provides significant insight regarding the proportionality and legitimacy of the measures applied.

## **1. Grounds for the establishment of quarantine in Lithuania**

The onset of an unmanageable situation in the world has had eternal consequences in all countries – for the first time in the modern world. A “global emergency” has been declared (Birmontienė, Miliuvienė, 2020, p. 8), to which the global society and legal community have never been prepared. Although different special regimes have been introduced in some countries, with some countries declaring a state of emergency (Romania, Portugal) and others adopting special COVID-19 laws (France, the United Kingdom, the Netherlands, etc.) (Conference Legal Challenges of the COVID-19 Pandemic: Preparing for the Future and Assessing the Mistakes Made, 2021) all these regimes pose a significant challenge to democracy, fundamental human rights, the protection of liberties, and the rule of law.

On February 26, 2020, the Lithuanian Government introduced a state-wide emergency by a resolution (Resolution No. 152 Declaring a State of National Emergency, 2020). When COVID-19 spread was declared a global pandemic (World Health Organization, 2020), the Government announced the third (full readiness) level of civil protection system readiness and quarantine covering the entire State and established specific restrictions on Constitutional human rights and freedoms (Resolution No. 207 Declaring Quarantine on the Territory of the Republic of Lithuania, 2020) (hereinafter – **Resolution No. 207**).

Following the end of the first quarantine in June 2020, the Government re-announced the quarantine in November (Resolution No. 1226 Declaring Quarantine on the Republic of Lithuania's Territory 2020). Many legal scholars have raised the question of whether the quarantine was commissioned legally, given that any restrictions of economic activity should be decided by the Parliament as Constitutional law requires (see following chapter).

The Constitutional principles of the rule of law and the division of powers presuppose that the regulation of such special legal regimes strikes a balance between the powers

granted to the executive authority to effectively combat the consequences of a special situation and the abuse of powers conferred on them by the executive authorities (Gross, Ní Aoláin, 2006, p. 63). The principles of both democracy and good governance must be maintained. Even in such an unprecedented situation, its uniqueness must be reconciled with fundamental, unchanging values and human rights protection.

Lithuania's Constitutional jurisprudence states that imposing extraordinary measures must be limited in time, clearly worded and comply with the requirement of proportionality. It should be mentioned that the Constitutional jurisprudence also formulates the doctrine of a particular situation in the event of a challenging economic and financial crisis in the State. They may be limited to the extent necessary to ensure the vital public interest, to protect other constitutional values (Rulings of the Constitutional Court of the Republic of Lithuania of February 6 2012, May 14 2015). Thus the pursuit of preserving human and public health and ensuring the best possible protection of them is a precondition for ensuring other vital Constitutional human rights and freedoms (Ruling of the Constitutional Court of the Republic of Lithuania of May 16 2013).

The Constitution (Constitution of the Republic of Lithuania, 1992) states that two types of particular legal regimes may be introduced that would impose restrictions on specific human rights and freedoms: Article 142 of the Constitution regulates the State of war and Article 144 of the Constitution regulates the State of emergency. However, none of these grounds were applied since the quarantine was based on other laws (Resolution No. 113 Declaring a State of National Emergency, 2020). Thus, the Government relied on the State of emergency to adopt restrictions on Constitutional rights and freedoms. Such limits are legally impossible since they do not follow the Constitution and Constitutional jurisprudence.

The introduction of such a measure must consider the essence and the form of the document based on which such treatment is adopted. According to the classical constitutional doctrine of restriction of human rights and freedoms, one of the conditions for the lawful limitation of human rights and freedoms is that such restrictions can be established only by law. This is also *expressis verbis* enshrined in the Constitution according to which the relevant right or freedom may be restricted on the basis of the protection of public health. Consequently, regardless of the legal regime chosen (emergency, other special legal regimes, emergency, quarantine, etc.), the Seimas should be the primary institution that decides that the introduction of such a regime at the state level is necessary and what human rights and restrictions on freedoms must be established in the event of a threat to a constitutional value, such as public health (Birmontienė, Miliūvienė, 2006, p.10). Thus, it may be discussed that the Government acted *ultra vires* and disregarded the rules enshrined in the Constitution since restrictions were imposed by a secondary legal act and not a law.

The Government adopted the resolution based on the Law on Civil Protection (2009) and the Law on Diseases (2011). Yet, the provisions allowing to the declaration of a state of emergency and quarantine should be deemed unconstitutional. They do not establish a mechanism of the Parliament to revise the measures.

The Government cannot act *ultra vires* in issuing its acts; it must abide by the Constitution and the laws. If the Government did not observe the regulations, the constitutional principle of a state under the rule of law that presupposes a hierarchy of legal acts and division of powers would be denied (Ruling of the Constitutional Court of the Republic of Lithuania of May 23 2007).

According to ex-judge of the Constitutional Court and professor of Faculty of Law, Vilnius University Egidijus Šileikis, these actions pose a severe threat to the whole hierarchy of legal acts which is enshrined in the Constitution (Conference Legal Challenges of the COVID-19 Pandemic: Preparing for the Future and Assessing the Mistakes Made, 2021). Thus all of the imposed restrictions should be approved by the Parliament. This would act as an effective preventive measure against possible future lawsuits against the State (Nekrošius, 2020). Such negligence of human rights and freedoms, the Constitution and the whole legal order, can lead to a serious legal crisis. To restore the situation, politicians ought to implement the law for quarantine and state emergency.

## **2. The concept of freedom of economic activity and ground for its limitations**

Since there was no common strategy of taming the pandemic, some opted for extremely strict measures and declared a state of emergency. Others applied more lenient regimes (Lebret,

2020). However, in all cases, restrictions on rights and freedoms were introduced, which in many countries were regarded as the most stringent since the Second World War (European Parliament report, 2020). Freedom of economic activity is enshrined in many European democracies' constitutions and is closely linked to one of the classics, universally recognized rights to property (Birmontienė, 2010, p. 12). Freedom and initiative of a person's economic activity is a set of legal possibilities that create preconditions for a person to make decisions necessary for his or her economic activity independently. This freedom of a person may also be connected with a certain activity of the State in the economy by state institutions regulating the processes of economic activity in a certain way to guarantee this personal freedom (Vasarienė, 2020, p. 80). During the quarantine, businesses have suffered losses and harsh restrictions. Thus it is essential to define what the freedom of economic activity is, what protects private property and how it is regulated by Lithuanian law and relevant international legal acts.

## 2.1. The concept of freedom of economic activity according to the Constitution of the Republic of Lithuania

The right of private property, the freedom of economic activity and initiative are interrelated and cannot be separated (Ruling of the Constitutional Court of the Republic of Lithuania of May 13 2005). The Constitutional Court holds that the freedom of economic activity of a person to increase interest in loans is declared as exercising one's property rights and emphasizes the integral connection of the freedom of economic movement with property rights. The Court also states that a fundamental role is assigned to private property – one of the fundamental values on which the economy of the nation is based (Ruling of the Constitutional Court of the Republic of Lithuania of October 27 1998) and that a person's constitutional right to property is an essential condition for the exercise of a person's economic freedom and that restricting a person's right to property also restricts a person's freedom of economic activity (Ruling of the Constitutional Court of the Republic of Lithuania of March 14 2002).

The Constitutional Court holds that when regulating economic activity, the State must observe the principle of coordination of personal and public interests, ensure the interests of both a private person (economic activity entity) and the public are respected, and no claim should be given automatic primacy against another (e.g., Rulings of the Constitutional Court of the Republic of Lithuania of April 9 2002, January 26 2004).

## 2.2. Possibilities of Constitutional right restrictions

Freedom and initiative of a person's economic activity is a set of legal possibilities that create preconditions for a person to make decisions necessary for his/her economic activity independently (Vasarienė, 2020, p. 80).

In its ruling of March 31, 1994, the Constitutional Court held that when a person participates in economic activities, it may be subject to special restrictions if they are:

- 1) established by law;
- 2) necessary in a democratic society to protect the rights and freedoms of other persons and the values enshrined in the Constitution, as well as constitutionally important goals; 3) they do not deny the nature and essence of rights and freedoms; 4) the principle of constitutional proportionality is observed as one of the elements of the constitutional principle of a state under the rule of law. It also means that the restrictions must comply with legitimate and important goals, and they should not go beyond what is necessary to achieve those goals. The restriction must be reasonable, adequate to the objective pursued, non-discriminatory (Ruling of the Constitutional Court of the Republic of Lithuania of May 13, 2005). It is essential to bear these conditions in mind. During the quarantines in Lithuania, restrictions were implemented without a transparent system of

compensating losses resulting from forced closure and their proportionality was never reviewed. Moreover, this kind of regulation must be implemented by law. However, quarantines were imposed without law but by resolutions.

These principles formulated by the Constitutional Court were based on the doctrine of restriction of human rights developed by the ECtHR.

As for implementing these principles in practice, restrictions on the freedom of economic activity must be established by law. There is no reason to state unequivocally that the Government's Resolution No. 207 based regulations for individual entities of commercial, economic activity complied with the requirement of legality. After assessing said resolution, the Law on Civil Protection and the Law on Diseases in force at the time of the resolution's adoption, the authors deem that these laws did not explicitly provide the Government with the discretion to impose restrictions on economic activities, such changes were made only later – on March 31, 2020, the Law Amending Articles 2, 8, 9, 18, 21 and 36 of the Law on Diseases No. I-1553 was adopted, supplementing Article 21. It sets out in clear terms and directly the restrictions on the freedom of movement of a person and economic activity freedom. It should also be mentioned that a similar situation arose with the provision of Article 8 of the Law on Civil Protection, the content of which was changed by supplementing and reorganizing it to establish the possibility of restricting the freedom of economic activity. The new wording of the amendment to Article 8 of the Law on Civil Protection, adopted after the quarantine was established, provided that in carrying out rescue, search and emergency works, liquidation of an event, emergency and elimination of their consequences in the cases and following the procedure established by this and other laws, the freedom of movement of a person, the rights of ownership and inviolability of housing may be temporarily restricted. In the event of a state emergency – the freedom of economic activity and the provision of public and administrative services may also be restricted.

This leads to the assumption that the declarations of quarantine at the time of their entry into force were not entirely legally appropriate. The Government was granted such a right only after adopting amendments and additions to the articles mentioned above that established the Government's discretion to restrict economic activities (Vasarienė, 2020, p. 87). This only confirms that the Government did not give proper consideration to actions, restrictions, adopted prohibitions, and only later thought that such bans were not possible following the legal norms and general principles of law in force at that time. In this case, we could compare it to the *fruit of the poisonous tree* doctrine stating that law does not come from lawlessness. It must also be observed that amendments do not have a retroactive effect meaning that the first quarantine was unsubstantiated. In essence, the quarantine measures under the Government's Resolution are restrictions of economic activity and property rights, both of which may only be restricted by laws enacted by the Parliament.



E. Šileikis confirms that the question arises whether, in addition to the possible violation of the principle of proportionality, the constitutional principle of equality of persons has not been violated (and even continues to be violated), when some economic activities are subject to stricter restrictions than others, such as, in principle, no restrictions on banks or grocery stores, allowing for a full range of services. However, catering establishments are subject to very strict operating rules (Šileikis, 2020).

Thus, the principle of proportionality may be infringed where, while protecting one constitutional value (human and public health), another equivalent constitutional value is restricted or denied to an unreasonable extent (Vasarienė, 2020, p. 81).

### 2.3. The concept of freedom of economic activity under Convention for the Protection of Human Rights and Fundamental Freedoms

In its ruling of March 14, 2002, the Constitutional Court held that a person's constitutional right to property is an essential condition for the exercise of a person's financial freedom and that restricting a person's right to property also limits a person's freedom of economic activity. Thus the meaning of freedom of economic activity is equal to the private property of a person. Furthermore, such ideas are being also developed by the Lithuanian economists who argue that "<...> property is not just a plot of land, a stand, or a building. By losing the opportunity to work, use their hands and tools, carry out their obligations and contracts, people have lost their property and, consequently, their livelihood" (Leontjeva, 2020).

In assessing the State's restrictions in the field of freedom of economic activity, it should be emphasized that one of the essential violations in this context is the violation of property protection – disregard for one of the most important human rights not only in national but also in international law. It must be noted that neither the main text of the ECHR nor the protocols supplementing it explicitly mention the freedom of economic activity. However, freedom of economic movement is closely linked to the classic right to private property enshrined in Protocol No. 1 to the ECHR (hereinafter – **Protocol No. 1**) (Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, 1952). The non-inclusion of the property protection norm in the main body of the ECHR was due to several main reasons: the introduction of a guarantee of protection of the property right should have led to the introduction of common standards of security, which economically weaker states feared as to whether they would be able to guarantee them at the same level as economically more vital states; there were fears that the provision of property guarantees could undermine public social planning, hamper planned reforms that often lead to restrictions on private property rights (Švilpaitė, 2003). The Protocol entered into force under Lithuanian jurisdiction on May 24, 1996.

In 1979, ECtHR stated that “<...> by recognizing that everyone has the right to the unrestricted enjoyment of his possessions, Article 1 of Protocol No. 1 guarantees the property right. The words “assets under management” and “use of assets” create such a clear impression” (Marckx v. Belgium, 1979).

Such a position is also further developed by stating that the first thing to bear in mind when considering Article 1 of Protocol No. 1 is that the concept of property, or “possessions,” is very broadly interpreted. It covers a range of economic interests. The following have been held to fall within the protection of movable or immovable property, tangible or intangible interests, such as shares, patents, an arbitration award, the landlord’s entitlement to rent, the economic interests connected with the running of a business, the right to exercise a profession, *etc.*

In another case, the applicant, a limited liability company, applied before the ECtHR to revoke its license to trade alcoholic beverages and argued that it infringed its property rights Protocol No. 1. The Swedish Government disagreed, arguing that a license to trade in alcoholic beverages could not be considered “property” in the context of Article 1 of Protocol No. 1. In its examination of the case, the ECtHR stated that the license itself was not an object of protection but an economic interest, *i. e.* the possibility of obtaining income from the licensed economic activity is an object protected by Article 1 of Protocol No. 1 (Tre Traktörer Aktiebolag v. Sweden, 1989).

In a case against Greece, the applicant, who had been engaged in open-air cinema services by leasing the state-owned land, alleged that his right to unimpeded use of property under Article 1 of Protocol No. 1 was violated when the State unreasonably evicted him from the leased land and could not continue its economic activity. The Greek Government stated that the eviction order deprived the applicant of the right to use and manage the land but did not prevent him from doing business. The applicant had the opportunity to find another place for his business. The ECtHR upheld the applicant’s side in this case and stated that in Article 1 of Protocol No.

1, the established concept of “property” has an independent meaning, which is not limited to the ownership of physical objects, but may be certain rights and interests of the owner. The ECtHR noted that during the 11 years of economic activity, the circle of clients of the respective area was formed by the applicant. The right to use its property without hindrance was violated by not allowing further economic activity, as a result of which the undertaking could not conclude new contracts (Iatridis v. Greece, 1999). The analysis of said documents shows that conducting economic activity falls under the protection of private property regardless of whether the applicant had a possibility to re-allocate or redirect their work line. This is particularly relevant given that the Lithuanian Government directly seized economic operators’ ability to engage in their operations.

The ECHR recognizes the non-absolute nature of freedom of economic activity and these conditions must be met: legality, compliance with the general interest of the society, proportionality. Therefore, we can state that due to the detailed and extensive

jurisprudence of the ECtHR, these conditions also basically correspond to the unique and general conditions for restriction of the freedom of economic activity mentioned in the constitutional jurisprudence of the Republic of Lithuania.

Both legal and natural persons may invoke Article 1 of the Protocol (Carss-Frisk, 2001). Due to the Government's restrictions, both companies and self-employed persons were prohibited from engaging in economic activity. Such a concept of freedom of economic activity ultimately corresponds to the subject of freedom of analysis mentioned in the Republic of Lithuania's constitutional doctrine.

The close connection between this freedom and the right to private property enshrined in ECHR has led to certain aspects of an individual's economic freedom being interpreted in the ECtHR case law. Article 1 of Protocol No. 1 defends a wide range of financial property rights and interests. The criteria of conventional property identification (economic value, reality) distinguished in the Court's doctrine allow extending the limits of protection of the right of ownership by protecting the property guarantee to any new object, including economic activity. It is clear that there is no precise mechanism with precise criteria that could help to distinguish between things falling within the scope of Article 1 of the Protocol No. 1 and those that are not considered "property", so it is difficult to predict the recognition of one hundred percent protected object within the meaning of Article 1 of Protocol No. 1 (Juškevičiūtė-Vilienė, 2017, p. 286). Given that the concept of property is interpreted broadly, it can be argued that the prohibition or restriction of certain activities should also be considered as an infringement of the property right, both in the sense of national and international law.

It is crucial to note that the Government's quarantine violates and restricts the rights and freedoms enshrined in the Constitution of the Republic of Lithuania and, more importantly, the fundamental right of private property protection under the ECHR.

Although the ECHR does not directly enshrine an economic operator's right to pursue an economic activity freely, it is protected in the context of Article 1 of Protocol No. 1 as a fundamental monetary unit with an economic value and a set of protected freedoms. Therefore it is necessary to ask whether the quarantine regime introduced in Lithuania, which is essentially a deprivation of the opportunity to operate and develop a business (thus, and a violation of the Protocol No. 1), is not considered a restriction of economic activity, but instead the restriction of property.

### **3. Proportionality and grounds of restrictions**

To successfully tackle the pandemic, governments need to protect both society's health and the economy. It is crucial to strike a balance between the spread of the disease and the suspension of economic activities.

The protection of the property is established in various national and international legal acts, e.g., Article 23 of the Constitution (1992) says that property shall be invio-

lable' In Lithuania's case, multiple companies complained about the Government's inability to provide reasonable and, in some cases, at least some kind of compensation for a business that has had to close due to the State's unilateral decisions. As proven in the previous section, business closure due to imposed restrictions of quarantine falls under Article 1 of Protocol No. 1 ECHR. This demonstrates that compulsory business closures should be treated as taking ownership for public needs. In its essence, the quarantine measures deprived the economic operators of any means of carrying out their functions, thus resembling seizure of property rights rather than restrictions of economic activity, since regulations of economic activity, such as requirements for licenses, restrictions of advertising etc. only add additional barriers to operating instead that eliminating possibilities of conducting business. In terms of seizure of private property, the Constitutional Court has stated that restricting the rights of ownership in all cases must be restricted only based on law, the principle of proportionality must be respected (Ruling of the Constitutional Court of the Republic of Lithuania of March 14 2002) and a person whose property is taken for public needs has the right to demand compensation (Ruling of March 4 2003 of the Constitutional Court of the Republic of Lithuania).

During the first and second quarantines, many businesses were closed by Government-implemented restrictions to curb the virus's spread. Businesses were closed not because of the virus itself but because of unilateral decisions of the Government. Thus such actions are considered as taking ownership for public needs and business owners must be compensated. The Government's main underlying idea to close various businesses is to fight the virus spreading, i.e., to protect the public. Hence, the State must be liable for its decisions. It is unjust to require the businesses and people to "pay" for the Governments unilateral decisions, particularly given that companies paid through lost income.

During the first lockdown that happened from March to June 2020 businesses in cultural, entertainment, leisure, and other establishments were prohibited from providing services. Most had no alternative means of operating. When comparing Lithuania's incidence with other EU countries, where there have been thousands of new cases a day, these severe business constraints may appear excessive it should have been revised as soon as new evidence came to light.

In the first two months, some business sectors were left on their own without any compensation. Then-Prime Minister of Lithuania made a questionable statement "if the business gets such survival dilemmas in a month, whether to go bankrupt at all or to continue operating, then maybe not everything was in order with those businesses" (Delfi, 2020). It can be concluded from such speeches from state leaders that when businesses were forcibly shut down, the Government was reluctant to follow the previously analysed Constitution and Constitutional jurisprudence. During the quarantine, it was not known for a long time what the compensation would be and how it would be shared between businesses. It violates the Lithuanian Constitutional Court statements about

appropriate remuneration and a clear system for its distribution. Needless to say, the requirement of laws to be foreseeable and not to create uncertainty.

In some EU countries, restrictions were revised. E.g., in the Netherlands, a curfew was introduced. In response, the High Court of the Netherlands ordered to scrap this curfew because it was not an “acute emergency” (BBC News, 2021). Besides, the Constitutional Court of Austria stated that country’s anti-coronavirus measures were partly illegal. Specifically, the Court objected to the ban on shops. Judges noted that the partial easing of store closures was unlawful, as only businesses with less than 400 square meters of retail space were allowed to open. According to Austria’s Constitutional Court, this discrimination could not be justified (Grüll, 2020). In Belgium, on few occasions, courts said that implemented COVID-19 rules are unconstitutional. One of them was when a police court magistrate in Brussels had acquitted a man charged with failing to wear a face mask, arguing that the obligation to do so is against the right of freedom of movement (Hope, 2021). In a nutshell, in the Netherlands and Belgium cases, the Court argued that the executive did not mandate to impose prohibitions on freedom of movement by an act of Government because this kind of bans required Parliament’s law. In Lithuania, on February 4, 2021, a complaint by the “Aukštaitijos implantologijos klinikos” seeking compensation loss of income due to the quarantine was rejected by the Vilnius Regional Administrative Court. Courts ruled that the Government did not exceed its powers in developing and applying quarantine prohibitions (Decision of the Vilnius Regional Administrative Court of February 4, 2021), emphasizing that the pandemic situation was unclear in its beginning. However, this does not limit the possibilities of suing the State for the unjust second quarantine since the pandemic spread was more understandable.

During the second quarantine in Lithuania, when this article has been written same restrictions were implemented, but some remuneration was distributed among companies. It was done without a proper and adequate system leading to more legal uncertainty and imposing higher risks on the economy’s future. From the retrospective, the second quarantine shows how disproportionate and excessive restrictions occurred during the first quarantine since the number of infection cases was a lot lower than during the second one. The Government is taking steps in introducing more leeway restrictions, such as allowing certain shops to operate if they meet an area requirement. Beauty services are also entitled to open, ensuring that a certain amount of space per client is assured. This is a great example what is the restriction of freedom of economic activities. However, until these decisions, the Government’s practice was to close everything, which resembles more that of private property seizure.

It can be claimed that restrictions implemented during the first and second quarantines were disproportionate. It is unjustifiable due to short-time and narrow-minded decisions to fight COVID-19, not considering the long-term effects on the economy.

#### 4. Compensation for legal entities

The Constitution, other national legal acts, and international legal acts applicable in Lithuania guarantee comprehensive protection of private property rights. The same legal acts ensure the possibility for the State to restrict the implementation of private property rights to preserve the nation's common welfare. In Lithuania, the primary legal actions that establish the legal protection of the right of ownership provide the possibility of establishing the methods of restriction of the right of ownership and even establishing the institute property seizure for society's needs.

Lithuania ratified ECHR in 1995. According to Article 138 of The Constitution, ratified treaties become part of the Lithuanian legal system. Due to this, it is essential to take account of ECHR when creating and implementing national laws. Hence, as the authors have already mentioned, the Constitution states that property is inviolable; Article 1 of Protocol No. 1 ECHR states that every natural or legal person is entitled to his possessions' peaceful enjoyment.

Thus, the standards of protection provided for in Article 1 of the Protocol No. 1 apply to both rights in rem and obligations. The rule set out in this article guarantees the protection of a wide range of different types of property, applicable to both movable and immovable property (securities and licenses, rights of claim, building permits, social benefits, hunting and fishing rights) (Jočienė, Čilinskas, 2005, p. 207). In this case, Lithuania also has such regulation when businesses, enterprises and income from them are also treated as property objects.

The ECHR guarantees protection against unilateral action by the State regarding the existing property, leaving states free to restrict property rights if the general interest requires so. Yet any measure banning the right to property must be lawful, imposed in the public interest and proportionate (Švilpaitė, 2003, p. 27).

Such a principle is also enshrined in national law. The Constitution states that property is inviolable. Inviolability of property means the right of the owner, as the holder of subjective rights to property, to demand that other persons do not violate his rights, as well as the duty of the State to protect and protect property from unlawful encroachment on it (Ruling of the Constitutional Court of the Republic of Lithuania of December 13 1993).

Having repeatedly assessed the constitutional guarantee of the inviolability of property, the Constitutional Court notes that in legal language, inviolability is generally understood as an inviolable, inalienable human right. The legislature must enact laws to protect the owner's property rights from unlawful encroachment (Rulings of the Constitutional Court of the Republic of Lithuania of August 23, 2005, June 22, 2009).

The Constitutional Court ruling of December 13, 1993, established that neither the Constitution, the current system of other laws, nor the universally recognized norms of international law deny the possibility to expropriate property or restrict its mana-

gement, use or disposal under the conditions and following the procedure established by law. Yet restrictions must be established by law. They are allowed only when they are not in conflict with the Constitution. The fact that property may be confiscated is also confirmed in the Constitution, which provides that “property may be confiscated only for the needs of society following the procedure provided by law and shall be fairly compensated”. The principle of proportionality arising from the Constitution requires in each case an assessment of whether the taking of private property is an appropriate and least restrictive measure of the human right to the protection of property, or whether the objectives pursued cannot be achieved by less restrictive means (Ruling of the Constitutional Court of the Republic of Lithuania of September 19 2002), the latter one significantly raising many doubts in terms of the quarantine.

Even in the absence of a formal transfer of ownership, state interference in a person’s right of ownership to an appropriate extent can, according to the ECtHR, be equated with *de facto* expropriation and qualified as the taking of property for the needs of society (Sporrong & Lönnroth v. Sweden, 1982). Thus, when talking about seizing property legal entities can be included in the concept of ownership, when the Government restricted economic activity freedom and provided compensation for it by imposing restrictions throughout the country. But were those compensations fair, adequately paid, and proportionate?

The authors of this article interviewed Vilnius Night Alliance representative Mark Adam Harold. He said that during the first months of quarantine, national and local Government ignored the nightlife and catering sectors and then finally Government provided support. It was only 50% of what these sectors needed. Furthermore, a representative said that these two sectors were closed based on the discriminated basis because no research or analysis suggests that the virus is spreading in these sectors. The same happened during the second lockdown then these sectors were closed first without data and scientific arguments. It once again validates the statement – lockdown was implemented without respecting the principle of proportionality.

#### 4.1. First quarantine

In the first few months of the first quarantine, SMEs especially the culture, nightlife and catering sectors, were ignored by the national and local governments. In May 2020, the Vilnius City Municipality announced its plan to combat pandemic consequences (Vilnius City Municipality, 2020). The project included various business aid measures, e.g., exemption from rent; exemption from levies for activities affected by quarantine; deferral of payments for utilities; freedom for outdoor cafes: a gift of urban public spaces to outdoor cafes – even for those who do not have outdoor cafe permits. Some of these actions were implemented nation- wide, like exemption from rent. Unfortunately, after some time, the plan was postponed for several weeks and the budget was reduced.

To summarise first quarantine Government help for businesses a few facts can be concluded. In a few months, many sectors were ignored when the financial support was prolonged. Other kinds of help were led by Vilnius city municipality, but not by the national Government.

## 4.2. Second quarantine

Following the second quarantine announcement, the Economics and Innovation Ministry (**Ministry**) announced that a plan was being prepared to help businesses. The package provides that subsidies based on reduced profits and tax rates payable. Ministry claimed that subsidies are estimated to reach companies within about two weeks of the application being filed (Žebrauskienė, 2021). Some companies had to wait longer for support. During this, every day is like a life and death situation for SMEs. Some businesses have been left without subsidies. This situation was a reason for a protest of bars and cafes which was held on February 20, 2021 (Sagaitytė, 2021). Even if businesses were to receive support from the first and second package already, a third package would also be needed in April.

Due to the fact that subsidiaries are very late and quarantine has not been lifted, protesters achieved that a second support package is being prepared. The second package of business support itself-employed, people who work on an individual basis, business certificates. The benefit granted to them will be linked to the paid Personal Income Tax. Additionally, Market vendors will be compensated for marketplace fees for two months. The second package of subsidies will only be for the worst affected, for those whose turnover has fallen by 60% or more (Kalinkaitė-Matuliauskienė, 2021).

At first sight, Ministry and the whole Government are trying their best to support various businesses. However, the entire system is prolonged. The quarantine support for businesses best describes Mark Adam Harold words “The first package covers debts five months ago, the second three months ago, and we’re thinking about the past”.

## Conclusions

1. The provisions that allow the Government to regulate the declaration of a state of emergency, the introduction of quarantine, and the imposition of measures should be assessed as unconstitutional in that they do not establish the competence of the Seimas to assess the imposition of a state of emergency and the determination of the measures to be taken under these special legal regimes.
2. The Government, by restricting the freedom of economic activity with its adopted and still being adopted by-laws, violates and restricts not only the rights and freedoms enshrined in the Constitution of the Republic of Lithuania but more



importantly – fundamental human rights and freedoms, stated in ECHR, more specific – the property right.

3. According to the ECHR, the closure of businesses due to quarantine, the Lithuanian Constitutional Courts and the logical method falls under the taking of property for public needs as enshrined in the Constitution of Lithuania. Therefore adequate compensations must be provided.
4. Restrictions implemented during the first and second quarantines were disproportionate. It is unjustifiable due to short-time and narrow-minded decisions to fight COVID-19, not thinking about long-term impact on the economy, more specific detrimental effects on companies' livelihoods. The compensation system is too bureaucratic, leaving many businesses without adequate compensation, which violates the proportionate remuneration principle enshrined in the legislation.

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## **RIBOJIMAI KARANTINO METU: PATEISINAMI, BET AR TEISĖTI?**

Santrauka

Šiame straipsnyje yra vertinami karantino metu įvesti ribojimai verslui Europos Žmogaus Teisių ir Pagrindinių Laisvių Apsaugos Konvencijos pirmo protokolo pirmame straipsnyje įtvirtintos teisės į nuosavybės apsaugos pagrindu. Straipsnyje analizuojami Europos Žmogaus Teisių Teismo, Lietuvos Konstitucinio Teismo bei kitų Europos Sąjungos šalių teismų praktika ir Lietuvos teisės aktai, siekiant nustatyti, ar karantinas ir su juo įvesti ribojimai yra teisėti. Taip pat vertinama, ar ribojimai verslui buvo proporcingi ir suteiktos kompensacijos lygiavertės patirties nuostoliams.

## **RESTRICTIONS DURING PANDEMIC: JUSTIFIED BUT IS IT LAWFUL?**

Summary

This article assesses the restrictions imposed during quarantine on business under the first article of the First Protocol of the European Convention on Human Rights and Fundamental Freedom Protection, which enshrines property protection. The article analyses the European Court of Human Rights’ case-law, the Lithuanian Constitutional Court and other European Union countries and Lithuanian legal acts to determine whether quarantine and restrictions imposed with it are lawful. It also assesses whether the restrictions on business were proportionate and compensated for losses of equivalent experience.

## Annex 1

### Questions for an interview with Mark Adam Harold, Vilnius Night Alliance representative

1. How much did quarantine cost: how many employees have been fired by small/ medium- sized businesses, what losses have business suffered?
2. What is the procedure for disbursing subsidies, on what grounds is their amount determined?
3. How do you assess the State's compensation, the separation of large businesses and individual activities (self-employed) and the differences in compensation rates, given that the self-employed are paid a fixed amount and companies receive variable compensation and benefits?
4. How do you view this week's decision not to allow small businesses to open? What impact can this have on these businesses?
5. Why has a class action not been organised before, for example, after the first quarantine?
6. Comparing the first and second quarantine, which caused greater damage?
7. VNA claimed that the restrictions on nightclubs' working time were potentially anti- constitutional in accordance with Articles 7, 29, 31, 48 of the Constitution and applied to the Government. What were the Government's arguments?
8. Can you compare the communication between the old Government and the new Government? Is stigmatization reduced?
9. Has the InBar app and a map of safe places worked? Could this tactic be applied now?

